

11 January 2016

The Hon. P D Cummins AM
Chair
Victorian Law Reform Commission
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Dear Chair

Use of Regulatory Regimes in Preventing the Infiltration of Organised Crime into Lawful Occupations and Industries; Supplementary Submission

On 26 August 2015, the Law Council of Australia (Law Council) provided substantive submissions to the Victorian Law Reform Commission's (the VLR Commission) Inquiry into the *Use of Regulatory Regimes in Preventing the Infiltration of Organised Crime into Lawful Occupations and Industries* (the Inquiry)

The Law Council acknowledges the opportunity to further assist the VLR Commission. This supplementary submission will focus on matters that have arisen since August 2015.

On 30 October 2015 the Queensland Organised Crime Commission of Inquiry released its Report¹ into organised crime in Queensland (the QOCC Report). In formulating its recommendations (particularly, with respect to the alleged involvement in organised crime of legal practitioners), the QOCC appears to have given primacy to material found in certain publications of the Australian Transactions and Analysis Centre (AUSTRAC) and Financial Action Task Force (FATF).

In its earlier submissions, the Law Council raised concerns with the VLR Commission about the material relied upon in those publications. The Law Council submitted that it lacked cogency, relevance and contemporaneousness- the collective effect of which undermined the confidence and reliance that could be placed on the conclusions reached therein, particularly in purporting to reflect the present state of affairs in the Australian context.

The Law Council is working with its constituent bodies in Queensland to raise these very concerns with the relevant authorities in Queensland.

It is telling that in the exercise of its independent powers of enquiry to request Queensland authorities to provide any information, the QOCC Report uncovered little, (if any) empirical evidence that Queensland's legal practitioners facilitate or are otherwise involved in organised crime. However, in reaching its conclusions, it appears that the QOCC may have deferred to the views expressed by the AUSTRAC and FATF papers.

Queensland Organised Crime Commission of Inquiry

The 578 page QOCC Report formulated 43 recommendations over a five month period from 1 May 2015 to the date the report was tabled 30 October 2015.

By its Terms of Reference² the QOCC Report was required to consider amongst other things:

- four key areas of organised criminal activity: (illicit drugs; child sex crimes; financial crimes and corruption); and also
- the role of certain *Key Enablers*, two of which included *money laundering* and the role of *professional facilitators*.

¹ Queensland Organised Crime Commission of *Inquiry into Organised Crime in Queensland*, Report, October 2015, available at https://www.organisedcrimeinquiry.qld.gov.au/_data/assets/pdf_file/0017/935/QOCCI15287-ORGANISED-CRIME-INQUIRY_Final_Report.pdf

² Ibid the Terms of Reference at Appendix 1 page 555.

The QOCC Inquiry accepted documentary evidence, conducted hearings (including in-camera hearings), requested information and received written submissions³ (including those of the Commissioner himself which were provided during the currency of the inquiry⁴).

Illicit Drugs

For the purpose of examining the illicit drug market, the QOCC Report focused on the roles that pharmacists and lawyers may play as facilitators. The report notes that the QOCC required the Queensland Police Service, the Crime and Corruption Commission, the Queensland Law Society, the Bar Association of Queensland and the Legal Services Commission:

- to provide any information in their possession that even suggested or tended to suggest that solicitors and/or barristers were involved in the commission or facilitation of producing, supplying, or trafficking in a dangerous drug and/or laundering the monies obtained from the commission of such offences directly or indirectly; and
- whether any of the persons to which those entities referred, were involved in their professional capacity in relation to the offending conduct.⁵

Ultimately the QOCC concluded that, based on the information before it, *there is no evidence that solicitors or barristers in Queensland have played a role in facilitating organised crime in the illicit drug market.*⁶

Organised Nature of Crime⁷

The QOCC Inquiry considered issues raised by the Australian Crime Commission on Cold Call Investment Fraud, Boiler Room Fraud and incidents of re-victimisation under Recovery Scams. The QOCC Report found:

- although solicitors may be used to draft the contracts presented to investors, and IT specialists are employed to design and produce professional-looking websites, the QOCC did not find evidence this is a widespread practice, and it appears that most of these professionals provide their services unwittingly;⁸

Based on the analysis of the Australian Crime Commission, the QOCC Report accepted that solicitors *could* unwittingly facilitate Boiler Room scamming (by tasks such as drafting caveats and contracts relevant to the business)⁹ though the QOCC confirmed it had *not found evidence of widespread 'knowing' participation.*¹⁰

Professional Facilitators¹¹

Though it observed that lawyers are routinely included in the list of professional facilitators, the QOCC Report acknowledged that *'very little has been written about specific instances of involvement or about the extent or prevalence of such involvement.'*¹²

Like the *'Victorian Law Reform Commission and AUSTRAC, the [QOCC] Commission found no reported cases'*¹³, and *'no evidence of any of the described activities [by the Australian Crime Commission] having been knowingly performed in Queensland'*¹⁴. Despite this lack of evidence,

³ The QOCC Report at page 20 refers to:

- 105 requests for written information were issued
- 43 requests for the provision of documents were issued
- nine summonses for attendance at a hearing were issued
- 25 requests for attendance to be interviewed were issued
- six in-camera hearing days were held
- 75 submissions were received.

⁴ Ibid at pages 501 and at 503 (which correspond to endnote references 27 and 28 for that section) record that Michael Byrne QC (the Commissioner) provided the Inquiry with a submission on 29 May 2015 and a Statutory Declaration on 11 September 2015.

⁵ Ibid at page 234

⁶ Ibid at page 28

⁷ Ibid at section 5.2.4 of the Report

⁸ Ibid at page 384

⁹ Ibid at page 421

¹⁰ Ibid at page 384

¹¹ Ibid at section 5.3.4 of the Report

¹² Ibid at page 415

¹³ Ibid at page 416

¹⁴ Ibid at page 414

the QOCC Report nevertheless concluded: *it is likely that lawyers in Queensland are facilitating organised crime in at least some of the ways outlined by the ACC.*¹⁵

It is the Law Council's submission; this conclusion can only be treated with such weight as the evidence which the QOCC Report had to sustain it. That is, the conclusion will bear no more or less weight than any other mere supposition as to matters that might or might not be the case. That the supposition is one that has been urged by law enforcement agencies such as the ACC does not give it any greater weight than any other supposition which is not based on objective evidence of substance. It is a conclusion which will not allow sensible cost/benefit analyses. Not only is it plain on the face of the QOCC Report that there is no evidence to substantiate the existence of the issues, there is no evidence that an issue exists on any wide basis. Because the level and extent of this perceived risk is not examined, there is not a proper basis to justify the taking of any steps which would impose financial burdens on the legal profession and the general public as a whole.

The QOCC Report essentially defers to the ACC, and forms a conclusion based on a subjectively assessed 'likelihood' that some unascertained number of lawyers may be susceptible to unwitting participation in the criminal acts of others. If there were a widespread problem, it is the Law Council's submission, likely that there would be widespread evidence. While 'absence of evidence is not evidence of absence', it is striking that in an area where such a significant amount of data has been collected over such a substantial period, that no evidence is available. It is the Law Council's further submission, that to justify widespread and invasive steps, there would need to be evidence of multiple events, occurring in the context of the current regulatory environment taken as a whole, and not adequately dealt with by that regulatory environment.

Money Laundering

Chapter 6 of the QOCC Report is devoted in its entirety to the topic of money laundering and Section 6.3.8 focusses on the role of *professional facilitators*. This section contains a discussion on *designated non financial businesses and professions* (DNFBPs) including, other proposed Tranche 2 sectors such as accountants, real estate agents etc. However, that part of the QOCC Report that discusses only lawyers in the context of money laundering differs from the rest of the Report in that it draws exclusively on the findings of:

- the FATF in the Mutual Evaluation Assessment of Australia (April 2015);
- the FATF's 2013 *Money Laundering and Terrorist Financing Vulnerabilities Of Legal Professionals*; and
- AUSTRAC's 2015 *Strategic Analysis Brief on Money Laundering through Legal Practitioners*.

This is confirmed by the Endnotes to this part of the QOCC Report¹⁶ which contain the references (numbered 83 through to 111) relied upon as authority for the statements made.

Case studies; lawyers

The QOCC Report, like those of AUSTRAC and the FATF, relies two 'Case Studies' that are directly drawn from AUSTRAC and FATF publications to assert that lawyers are involved in money laundering.

The first Case Study¹⁷ is also reported in the June 2015 AUSTRAC Strategic Analysis Brief on *Money Laundering through Legal Practitioners*. This 'case' was the subject of a complaint by a UK bank to the (then) NSW Legal Services Commissioner in relation to a fraud perpetrated with the unwitting involvement of a law practice in 2003 (i.e. prior to the 2006 commencement of the AML/CTF Act). The matter did not proceed to investigation or prosecution for money laundering or indeed any other criminal offence.

Soon after its publication in June 2015, the Law Council presented AUSTRAC's Chief Executive Officer and Senior Executive Team with its concerns about the Strategic Analysis Brief on *Money Laundering through Legal Practitioners*. The Law Council's concerns about AUSTRAC's Strategic Analysis Brief are elaborated upon in the Law Council's substantive submissions to the VLR Commission of August 2015.

¹⁵ Ibid at page 416

¹⁶ Ibid at pages 523 to 528

¹⁷ Ibid at page 517

The second Case Study¹⁸ referred to in the QOCC Report, mentions facts that suggest the complicit conduct of a UK solicitor in 2011. In terms of regulatory obligations, UK lawyers have been regulated for AML since 2001. This means the lawyer would have been subject to a range of regulatory obligations including to report his client's suspicious transactions, rather than his own. The case stands as evidence that the criminal law, rather than the regulatory regime of the AML regime, appears to have operated as intended.

It is telling to note that the QOCC Report in considering the involvement of lawyers in money laundering (whether to expose a regulatory weakness to be addressed or in order to support the allegations that lawyers are heavily involved in money laundering), has been unable to present any recent¹⁹ Australian case.

The QOCC Report details its requests for information. In the section entitled *Evidence of professionals in Queensland being involved in money laundering*, the QOCC Report mentions it:

*... required the QPS [Queensland Police Service], the CCC [Crime and Corruption Commission], the Queensland Law Society, the Bar Association of Queensland and the Legal Services Commission to provide any information in their possession from the last three years which suggested or tended to suggest that solicitors and/or barristers were either directly or indirectly involved in the laundering of monies obtained from the commission of offences.*²⁰ (our emphasis)

The QOCC Report made reference to two matters presently before the courts involving solicitors from the same law practice which, by its Terms of Reference²¹, the QOCC was prevented from having regard as matters subject of judicial proceedings. As these matters have yet to be determined, it is not appropriate to rely on their existence as proxies for evidence of wrongdoing on the part of the accused persons.

It should be observed that the QOCC did not find any relevant and cogent information or evidence in relation to legal practitioners to which it could have regard.

Conclusion

The Law Council is committed to working with Australian legal practitioners to avoid or prevent their involvement in organised crime and money laundering. In developing 'sector specific' guidance materials, allegations of involvement have been researched and analysed in order to distil from them where possible, the warning signs and red flag indicators relevant to legal practice. Part of this work also involves maintaining a watching brief for incidents and cases that might substantiate the oft repeated and frequently sensationalised claims that lawyers are involved in organised crime.

Both the inquiries of the QOCC and the VLR Commission have proceeded on the assumption that '*...the absence of obligations for lawyers, accountants and real estate agents under the Anti-Money Laundering and Counter-Terrorist Financing (AML/CTF) regime ...*'²² is a regulatory anomaly to be addressed. The Law Council is concerned that the already very significant level of regulation to which the legal profession is subject should be recognised as constituting significant safeguards against lawyers' unwitting involvement in money laundering or other serious criminality it contains.

Finally, like the QOCC Report, the Law Council has not found recent evidence of lawyer involvement in organised crime. Nor it seems has the Victorian Legal Services Board and Commissioner which submitted that:

'Unlike these [other] businesses, the legal profession in Victoria has always been very highly regulated...

...Lawyers of course may be called upon to advise clients who themselves are involved in organised crime. This could involve the lawyer advising on business structures and financial arrangements that might be used by the client in pursuing their criminal interests, unbeknownst

¹⁸ Ibid at page 518

¹⁹ No case from the present decade or even since the commencement of the AML/CTF Act in 2006.

²⁰ Ibid at page 522

²¹ The QOCC Inquiry into Organised Crime's Terms of Reference are at Appendix 1 page 555. Term of Reference paragraph 8 provides: *the Commission is not to have regard to any matter that is currently the subject of a judicial proceeding, or a proceeding before an administrative tribunal or a commission (including but not limited to, a tribunal or commission established under a law of the Commonwealth).*

²² Ibid at page 8.

*to the lawyer... This does not mean however that a lawyer can act contrary to the law or the ethical standards that bind them just because their client has advised them to...
...our experience of lawyers who could be said to be involved in organised crime is limited...our experience is that crimes committed by lawyers tend to be in the context of a rogue lawyer working alone, rather than as part of an organised group. We are not aware of infiltration into legal practices by organised crime groups...
...Limited examples exist of current practitioners who the regulator believes may have links with organised criminals. These instances are rare...²³*

The paucity of information or evidence in this regard is in the Law Council's view relevant because it suggests that existing regulatory and oversight arrangements are operating effectively.

In this regard the Parliamentary Joint Committee on the Australian Crime Commission's *Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups* urged that:

*... 'any legislative developments be considered and evidence based rather than politically driven'.
Ill considered legislation risks increasing Australia's already piecemeal legislative framework'²⁴*

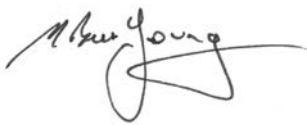
This is a principle the Victorian Government has in the past adopted, requiring that decisions about state interventions should be evidence based that is, regulation 'should be based on evidence available in the circumstances that is relevant and reliable'.²⁵

The Law Council's substantive submissions recommended that:

- the strength of the evidence that signals lawyers' involvement in money laundering and organised crime be critically assessed to determine whether there is a genuine regulatory gap to be addressed;
- the existing legal profession regulatory framework offers significant safeguards against lawyers' unwitting involvement in money laundering or other serious criminality;
- a thorough audit of the features of the existing regulatory framework and analysis of their performance should be undertaken to inform regulatory policy development and in particular the scope and degree of the regulatory gap (if any) that ought to be addressed; and
- any proposed increase/extension of the regulation must be demonstrably justifiable by way of comprehensive cost benefit analysis, at the very least it must contain measures that ensure costs are minimised and that the benefits outweigh the costs.

For purposes of this supplementary submission, the Law Council makes no further recommendations.

Please contact Carole Caple, Senior Lawyer at the Law Council on Carole.Caple@lawcouncil.asn.au should you require any further information.



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²³ Victorian Legal Services Board and Commissioner, Submission to the Victorian Law Reform Commission's Enquiry into the *Use of Regulatory Regime in Preventing the Infiltration of Organised Crime into Lawful Occupations and Industries*, August 2015 available at: http://www.lawreform.vic.gov.au/sites/default/files/Submission_CP_15_Victorian_Legal_Services_Board_%26_Commissioner_06-08-15.pdf

²⁴ Parliamentary Joint Committee on the Australian Crime Commission *Inquiry Into The Legislative Arrangements To Outlaw Serious And Organised Crime Groups* August 2009 available at https://www.aph.gov.au/binaries/senate/committee/acc_ctte/laoscg/report/report.pdf

²⁵ See for example statement in *Public Health and Wellbeing Act 2008 (Vic)* section 5